A

ONG KEH KEONG v. LEMBAGA TATATERTIB PEGUAM-PEGUAM

COURT OF APPEAL, PUTRAJAYA
HAMID SULTAN ABU BACKER JCA
HANIPAH FARIKULLAH JCA
B KAMALUDIN MD SAID JCA
[CIVIL APPEAL NO: B-02(A)-1397-07-2018]
17 JULY 2020

C ***ADMINISTRATIVE LAW:*** *Judicial review – Application for – Disciplinary Board ('DB') affirmed findings of liability against advocate and solicitor by Disciplinary Committee ('DC') – Issuance of notice to advocate and solicitor pursuant to s. 103D(2) and (4) of Legal Profession Act 1976 – Whether DB made 'decision' – Whether application for judicial review of DB's finding premature – Whether abuse of court process – Rules of Court 2012, O. 53*

D ***LEGAL PROFESSION:*** *Disciplinary proceedings – Disciplinary Board ('DB') – Complaint against advocate and solicitor – Affirmation of findings of liability by Disciplinary Committee ('DC') – Issuance of notice to advocate and solicitor pursuant to s. 103D(2) and (4) of Legal Profession Act 1976 – Whether DB made 'decision' – Whether DC's decision binding on DB – Whether application for*
E *judicial review of DB's finding premature – Whether amounted to attempt to short circuit disciplinary process*

The complainant, the vendor in a sale and purchase agreement ('SPA'), alleged that the applicant, whilst acting as the solicitor for the purchaser in the SPA, without his knowledge and consent, had amended or altered certain
F terms in the SPA. The amendments were done fraudulently, purportedly to avoid the purchasers from having to pay late payment interests. Hence, a complaint was lodged against the applicant. The Disciplinary Committee ('DC'), upon finding the applicant guilty of dishonest and fraudulent conduct in breach of s. 94(3)(c) of the Legal Profession Act 1976 ('LPA') and guilty
G of conduct which was unbefitting of an advocate and solicitor under s. 94(3)(o) of the LPA, recommended that the applicant be suspended from practice for one month and a fine of RM5,000. The respondent, the Disciplinary Board ('DB'), affirmed the DC's finding on liability but disagreed with the punishment and consequently, issued a notice dated
H 4 November 2016 to the applicant to appear pursuant to s. 103D(2) and (4) of the LPA with a view to enhance the punishment. The applicant thus applied for and obtained leave to apply for judicial review against the respondent's ruling. The respondent sought to strike out the judicial review application under O. 18 r. 19 of the Rules of Court 2012 ('ROC') on the
I grounds that the decision of the respondent dated 13 October 2016 was not amenable to judicial review and in the circumstances, the applicant's application for judicial review was premature and amounted to an attempt to short-circuit the statutory disciplinary and appellate process provided in

the LPA. The High Court allowed the application and hence, the appeal. The issues for the court's determination were (i) whether a judicial review application may be struck out by an application under O. 18 r. 19 of the ROC after an order for leave has been granted; (ii) whether it was an abuse of the process of the court to apply for judicial review proceedings when the DB had not made its decision.

Held (dismissing appeal with no order as to costs)
Per Hanipah Farikullah JCA delivering the judgment of the court:

(1) The issue of whether a judicial review application may be struck out by an application under O. 18 r. 19 of the ROC after an order for leave has been granted was raised for the first time in the applicant's written submission in this appeal. The issue was not raised before the High Court and neither was it included by the applicant in his memorandum of appeal. An appeal court will not allow an appellant to argue a ground that has not been pleaded in its memorandum as a matter of essential justice to the court below and to the respondent who would have defended a judgment of the High Court on an unpleaded grounds of appeal. The applicant was therefore precluded from raising this point for the first time in this appeal. (paras 39-41)

(2) Pursuant to O. 53 r. 3(1) and (2) of the ROC, the proper procedure for the respondent to file the application is when the court has granted an *ex parte* leave to the applicant and the order was extracted and served on them. It was the service of the *ex parte* order together with the cause papers on the respondent that made the respondent party to the proceedings. It followed that the respondent could only file the application after leave to commence judicial review proceedings was granted by the court. Therefore, the High Court had not erred in law in allowing the respondent's application to strike out the applicant's judicial review application after leave had been granted. (para 42)

(3) Apart from requiring the applicant to make the application for judicial review with sufficient promptitude and to show that they were adversely affected by the decision of the public authority communicated to them, there must first be shown that a requisite decision by the respondent, as a public authority, had been made before the application could come within the bounds of O. 53 of the ROC. Therefore, it was not open for the appellant to argue, and for this court to hold, that *certiorari* will not lie to quash a decision if no such decision had been made by a public authority. (para 48)

(4) Pursuant to s. 103D(4), where a notice is issued to an advocate and solicitor, the DB must carry out a review of the nature of the punishment to be imposed on the advocate and solicitor. If the punishment imposed does not lead to an outcome satisfactory to an advocate and solicitor, then, he may appeal to the High Court against the said finding of liability

and the punishment. The applicant should avail himself of the representation to decide whether there were, at that stage, ground for judicial review. It is an abuse of the proceeding of the court to avoid the safeguard provided by s. 103(D) of the LPA. (paras 55 & 56)

(5) The DB's action on 4 November 2010 could not be characterised as a 'decision' within the meaning of s. 103D(4) of the LPA. A decision to affirm the finding on liability but disagreeing with the punishment recommended by the DC to be imposed on the application was not a 'decision'. Further, the DC's decision was not binding on the DB. Therefore, the commencement of the judicial review proceedings was premature given the applicant's failure to take the clear alternative step of making representation to the DB under s. 103D of the LPA which provides that before the DB makes an order that is likely to be adverse against an advocate and solicitor under sub-ss. (2) or (3), it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard. To allow the actions to proceed would be an abuse of the process of the court. (paras 59, 60 & 62)

(6) Judicial review is a remedy of last resort, to which recourse should normally be held only where there is no available alternative remedy. The act of the DB *vide* the notice dated 4 November 2016 was a step in the process which would ultimately lead to a decision which was reviewable after the DB imposed the punishment under s. 94 of the LPA. Thus, the applicant's remedy, if he was dissatisfied with the decision of the respondent dated 13 October 2016, was to wait for the respondent to make an order under s. 103D of the LPA after hearing the applicant on the issue of enhancement of punishment and then, to file an appeal to the High Court pursuant to s. 103E of the LPA. Hence, the applicant's application for judicial review was premature and amounted to an attempt to short circuit the statutory disciplinary and appellate process provided in the LPA. (paras 63, 67 & 68)

Case(s) referred to:

Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals [2012] 1 CLJ 805 FC ***(refd)***

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC ***(refd)***

Bintulu Lumber Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2020] 1 LNS 65 CA ***(refd)***

Century Land Resources Sdn Bhd v. Alliance Bank Malaysia Bhd [2004] 4 CLJ 793 CA ***(refd)***

Chin Mee Keong & Ors v. Pesuruhjaya Sukan [2007] 5 CLJ 363 CA ***(refd)***

Council of Civil Service Unions and Others v. Minister for the Civil Service [1984] 3 All ER 935 ***(refd)***

Iskandar Coast Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2019] 7 CLJ 143 CA ***(refd)***
Joo Seng Trading Co v. Commercial Importers And Distributors Sdn Bhd [2007] 2 CLJ 25 CA ***(refd)***
Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd [2017] 5 CLJ 283 CA ***(refd)***
Ketua Pengarah Kastam Dan Eksais v. Coach Malaysia Sdn Bhd [2019] 4 CLJ 454 CA ***(refd)***
Lai Cheng Cheong v. Sowaratnam Arumugan [1983] 1 CLJ 282; [1983] CLJ (Rep) 216 FC ***(refd)***
Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor [1995] 2 CLJ 713 CA ***(refd)***
M & W Zander (M) Sdn Bhd v. Director General Of Inland Revenue [2005] 6 CLJ 336 HC ***(refd)***
Malaysia Land Properties Sdn Bhd v. Waldorf & Windsor Joint Management Body [2014] 6 CLJ 821 CA ***(refd)***
Menteri Tenaga, Air Dan Komunikasi & Anor v. Malaysian Trade Union Congress & Ors [2012] 9 CLJ 858 CA ***(refd)***
Mohd Karim Abas & Ors v. Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja [2013] 1 LNS 280 CA ***(refd)***
QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA ***(refd)***
R v. St Lawrence's Hospital, Caterham Statutory Visitors, ex p Pritchard [1953] 1 WLR 1158 ***(refd)***
R (on the application of Archer) v. Revenue and Customs Commissioners [2020] All ER 7116 ***(refd)***
R (On the application of Glencore Energy UK Ltd) v. Revenue and Customs Comrs [2017] EWCA Civ 1716 ***(refd)***

Legislation referred to:
Legal Profession Act 1976, ss. 93, 94(3)(c), (o), (4), 95, 96, 97, 98, 99, 100(2), 101, 102, 103A, 103B, 103C, 103D(2), (3), (4), 103E(1), (2), 103EA, 103EB, 111
Rules of Court 2012, O. 18 r. 19(b), (d), O. 53 rr. 2(4), 3(1), (2), 9
Rules of the High Court 1980, O. 53 r. 3(2)
Sports Development Act 1997, ss. 18, 20, 21(1)(a), (c)

For the appellant - Ong Keh Keong; M/s Ong Partnership
For the respondent - Hoi Jack S'ng & Andrea Chew Mei Yng; M/s Lee Hishammuddin Allen & Gledhill

[Editor's note: For the High Court judgment, please see Ong Keh Keong v. Lembaga Tatatertib Peguam-peguam [2019] 4 CLJ 226 (affirmed).]

Reported by S Barathi

JUDGMENT

Hanipah Farikullah JCA:

[1] The appeal relates to an application for judicial review by the appellant ("applicant") against the decision of the learned High Court Judge at Shah Alam on 31 May 2018.

[2] The applicant, an advocate and solicitor was subject of a complaint by the Disciplinary Board.

[3] On 19 December 2016, the applicant filed this judicial review application against the respondent's ruling. In the judicial review application, the applicant sought for the following:

(i) a *certiorari* order to quash and annul the decision of the respondent in a hearing held on 13 October 2016 which affirmed the finding of liability against the appellant by the Disciplinary Committee constituted for the Complaint No. DB/13/8814; and

(ii) a *certiorari* order to quash and annul the Disciplinary Committee report dated 28 June 2016 and to annul the appointment of the Disciplinary Committee.

[4] From the statement-in-support of the application at the High Court, the applicant relied on the following grounds:

> 24. Saya amat terkilan dan mempertikaikan keputusan Responden yang dibuat pada 13.10.2016 yang telah setuju dengan keputusan DC dalam Laporan DC yang telah mendapati saya bersalah dan telah mengenakan hukuman denda RM5,000.00 dan penggantungan daripada praktis sebagai peguam selama 1 bulan.
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> 25. Saya berkata selepas menghantar surat bertarikh 26.4.2016 bersertakan surat akuan En Khor kepada DC saya tidak terima apa-apa maklum balas daripada DC sehingga bulan Ogos 2016 iaitu melalui surat DC kepada Responden.
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> 26. Oleh itu, saya berkata saya tidak tahu bahawa pendengaran Aduan Tersebut telah tamat walaupun saya masih ingin memanggil Cik Wong sebagai saksi untuk memberitahu DC bagaimana terdapat perjanjian jual beli yang mempunyai tarikh-tarikh berlainan.
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> 27. Sememangnya, saya adalah dalam keadaan kebuntuan ("helpless") kerana saya tidak tahu bahawa pendengaran Aduan Tersebut telah tamat dimana saya langsung tidak memasukkan Hujahan Bertulis untuk menentang Aduan Tersebut.
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> 28. Saya sesungguhnya percaya hak asasi saya seperti yang terkandung dalam Perlembagaan Persekutuan untuk mendapat pendengaran dan pengadilan yang saksama dan adil dihadapan DC telah dicabuli serta dinafikan DC dan Responden tanpa apa-apa alasan munasabah.
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> 29. Seterusnya, saya telah dimaklumkan oleh Responden melalui suratnya bertarikh 4.11.2016 yang melampirkan Laporan DC di mana setelah meneliti Laporan DC, saya mendapati DC telah menamatkan pendengaran Aduan Tersebut tanpa membenarkan saya untuk memanggil saksi utama, Cik Wong untuk menerangkan percanggahan tarikh-tarikh pada perjanjian jual beli tersebut.

30. Dalam laporannya, DC telah membuat penemuan fakta dan liabiliti dan memutuskan bahawa saya salah laku dalam perlakuan saya dan sebagai hukuman, saya telah didenda RM5,000.00 dan digantung daripada mempraktis sebagai seorang peguam selama sebulan dan Responden dalam mesyuaratnya pada 13.10.2016 juga setuju dengan penemuan liabiliti dan hukuman yang dikenakan ke atas saya sepertimana yang dinyatakan dalam Laporan DC.

31. Saya sesungguhnya berkata Responden langsung tidak mempertimbangkan isu-isu ketidakadilan dan kesilapan yang dibuat oleh DC seperti berikut:

a) DC telah menamatkan pendengaran Aduan Tersebut tanpa memberi saya peluang untuk memanggil saksi utama, Cik Wong iaitu bekas staf dan kerani di firma saya untuk memberi keterangan mengenai tarikh-tarikh yang berbeza pada perjanjian jual beli tersebut.

b) DC telah menafikan hak saya untuk memanggil Cik Wong sebagai saksi dalam pendengaran Aduan Tersebut walaupun saya telah memaklumkan kepada DC bahawa saya perlu memanggil Cik Wong untuk menerangkan fakta sebenar pindaan pada tarikh-tarikh perjanjian jual beli tersebut.

c) Dalam Laporan DC, DC telah terkhilaf apabila menyatakan bahawa saksi saya, En Khor tidak pernah hadir di mana-mana hari pendengaran Aduan Tersebut sedangkan En Khor telah hadir pada hari pertama pendengaran dan telah menunjukkan Perjanjian Jual Beli beliau yang bertarikh 12.4.2013.

d) Dalam Laporan DC, DC juga telah gagal mempertimbangkan kandungan surat akuan En Khor yang menyatakan Cik Wong telah berjanji untuk menolong beliau untuk memastikan bahawa tiada apa-apa faedah lewat akan dikenakan ke atas En Khor.

e) DC juga telah menyalahkan En Khor yang tidak dapat hadir pendengaran manakala DC sendiri yang telah melapangkan tarikh 22.2.2016 yang telah ditetapkan untuk pendengaran Aduan Tersebut dimana En Khor sedia untuk hadir sebagai saksi untuk disoal balas oleh Peguamcara En Chuah.

f) DC gagal mempertimbangkan bahawa atas keadaan sedemikian maka Pemohon terpaksa memohon surat akuan daripada En Khor untuk memberi keterangan bagi pihak Pemohon dan bukan seperti yang dinyatakan oleh DC dalam Laporan DC.

g) DC juga gagal mempertimbangkan bahawa cadangan keterangan En Khor melalui surat akuan adalah dimaklumkan oleh En Kem kepada Pemohon melalui emelnya bertarikh 30.3.2016 maka tidak terpulang kepada DC untuk menyatakan kandungan surat akuan tersebut tidak boleh diterima oleh kerana En Khor tidak disoal balas oleh peguamcara En Chuah.

h) DC tidak mempertimbangkan keterangan dan pembelaan Pemohon bahawa Pemohon langsung tidak terlibat dalam pengendalian fail dan dokumen transaksi ini yang kesemuanya adalah dikendalikan oleh Cik Wong, iaitu bekas kerani Pemohon.

i) DC gagal mengambil kira bahawa dalam fail Pemohon, satu-satunya perjanjian jual beli adalah bertarikh 12.4.2013 dan tiada apa-apa dokumen atau surat dalam fail yang menunjukkan tarikh yang lain.

j) DC gagal mempertimbangkan fakta bahawa Pemohon telah menyemak dengan anakguamnya, En Khor mengenai tarikh perjanjian jual beli dimana En Khor telah menunjukkan salinan perjanjiannya yang bertarikh 12.4.2013 maka tiada apa-apa dokumen atau surat yang mencadangkan atau menunjukkan tarikh perjanjian jual beli telah dipinda.

k) DC telah terkhilaf apabila tidak menimbangkan pembelaan Pemohon bahawa beliau tidak menjawab atau membalas surat dan tuntutan En Chuah kerana beliau tabah bahawa salinan Perjanjian Jual Beli dalam fail bertarikh 12.4.2013 dan aduan dan tuntutan En Chuah adalah remeh dan sengaja menyusahkan memandangkan En Chuah juga belum membayar bahagian cukai pintu yang masih dihutangi kepada En Khor.

l) DC telah terkhilaf apabila telah merujuk kepada surat daripada firma Pemohon kepada Tetuan Nadzifah, Sagunthala & Associates yang merujuk kepada perjanjian bertarikh 1.4.2013 tanpa mengambil kira pembelaan dan keterangan Pemohon yang telah mengatakan bahawa tiada apa-apa dokumen atau surat dalam fail Pemohon yang menunjukkan tarikh perjanjian jual beli adalah 1.4.2013.

m) DC gagal memperincikan tuduhan terhadap Pemohon sebelum pendengaran Aduan Tersebut.

n) DC telah terkhilaf apabila membuat penemuan fakta dan liabiliti tanpa mengambil kira bahawa beban bukti untuk membuktikan salah laku dalam pendengaran Aduan Tersebut adalah pendengaran "quasi criminal" maka beban bukti adalah "beyond reasonable doubt" dimana DC langsung tidak menyatakan bahawa penemuan fakta dan liabiliti Pemohon adalah memenuhi beban "beyond reasonable doubt".

o) Laporan DC yang dikemukakan kepada Responden adalah luput, salah dan tidak terpakai kerana tempoh masa untuk DC mengemukakan Laporan DC telah tamat sejak bulan April 2016 dan DC hanya memohon untuk perlanjutan masa pada bulan Ogos 2016.

p) DC telah terkhilaf apabila merujuk dan menggunapakai kesemua hujahan bertulis peguamcara En Chuah yang telah merujuk kepada laporan-laporan media yang tidak relevan dalam Aduan Tersebut dan amat memprejudiskan Pemohon dan sekaligus memesong pandangan DC dalam Aduan Tersebut.

32. Tambahnya, saya sesungguhnya percaya dan berkata Responden dalam membuat keputusan mengesahkan penemuan liabiliti dan hukuman seperti yang terdapat dalam Laporan DC, gagal berlaku adil terhadap saya dan langsung tidak memberi apa-apa pertimbangan untuk fakta-fakta berikut:

a) Responden telah berlaku tidak adil kerana langsung tidak menjawab atau membalas surat saya bertarikh 25.8.2016 bahawa Pemohon tiada menerima apa-apa maklum balas dari DC sejak daripada surat Pemohon kepada DC bertarikh 26.4.2016;

b) Responden tidak mengambil kira bahawa prosiding pendengaran DC adalah separa jenayah ("quasi criminal") maka penemuan DC tanpa mendengar keterangan saksi utama, Cik Wong adalah satu penemuan fakta yang tidak selamat, sangsi dan langsung tidak menepati tahap pembuktian melampaui keraguan yang munasabah ("beyond reasonable doubt") yang diperlukan untuk kes separa jenayah;

c) Responden telah terkhilaf apabila tidak mengambil kira bahawa DC telah membuat keputusan bahawa Pemohon telah salah laku/bersalah walaupun terdapat bukti kukuh yang menunjukkan yang sebaliknya; dan

d) Responden telah terkhilaf apabila menerima Laporan DC yang telah membuat fakta secara "hearsay" dan tidak mematuhi peruntukkan-peruntukkan Akta Keterangan 1950.

33. Saya amat terkilan dengan tindakan-tindakan DC dan/atau Responden yang telah merampas hak saya untuk mempraktis sebagai seorang peguam dimana dalam Laporan tersebut, Responden akan melucutkan hak saya untuk mempraktis sebagai peguam selama sebulan dan denda RM5,000.00. Maka, saya amat risau, bimbang dan dalam ketakutan akan masa hadapan dan kehidupan saya.

34. Saya juga ingin melaksanakan hak-hak saya untuk mendapat perlindungan yang sama rata dari segi undang-undang ("entitled to equal protection of the law") seperti yang diperuntukkan dalam Artikel 8 Perlembagaan Persekutuan. Sesungguhnya, saya telah ditindas secara opresif dan arbitari oleh Responden dan/atau DC tanpa mengambil kira lunas undang-undang yang sedia ada.

[5] On 8 February 2017, an application for leave to apply for judicial review was granted by Justice Yazid Mustafa.

[6] It is clear from the statement-in-support of the judicial review application that the applicant is asserting to impugn the alleged decision of the Disciplinary Board dated 13 October 2016 and the report of the Disciplinary Committee dated 28 June 2016.

[7] On 15 March 2017, the respondent filed an application to strike out the judicial review application under O. 18 r. 19 of the Rules of Court 2012 ("ROC 2012") on the grounds that the decision of the respondent dated 13 October 2016 is not amenable to judicial review and in the circumstances, the applicant's application for judicial review is premature and amounts to an attempt to short-circuit the statutory disciplinary and appellate process provided in the Legal Profession Act 1976 ("LPA 1976"). The application was heard before Justice Vazeer Alam Mydin Meera by which the learned High Court Judge allowed the application.

[8] The applicant appealed against the decision and order of the High Court.

The Factual Background

[9] We commence by referring to the factual background of the application made to the High Court.

[10] A complaint was lodged by Mr Chuah Gek Lye ("the complainant") against the applicant ("the complaint").

[11] In essence, the complaints are as follows:

(i) the complainant and his daughter were the owners of a property located in Kota Kemuning Shah Alam ("property");

(ii) the complainant and his daughter entered into a sale and purchase agreement dated 1 April 2013 ("SPA") to sell the property to Khor Hang Cheng and Khor Zhi Yang ("purchasers");

(iii) the applicant acted as the solicitor for the purchasers whilst the complainant and his daughter were not represented in the transaction;

(iv) the complainant alleged that the applicant had, without his knowledge and consent, amended or altered certain terms in the SPA;

(v) the amendments or alterations to the SPA were purportedly done to avoid the purchasers from having to pay late payment interests; and

(vi) the complainant contended that the applicant had acted fraudulently.

[12] On 16 February 2015, the respondent pursuant to s. 100 of the LPA 1976 appointed Samskrita Kemkumar Saviour Lopez a/l Gracian Lopez, Ng Thiang Tuan and Venugopal a/l Balan Mannadiar as members of the Disciplinary Committee to formally investigate into the complaint.

[13] The Disciplinary Committee heard the complaint on 15 July 2015, 22 September 2015, 28 October 2015, 8 January 2016 and 16 April 2016. It considered the statements of the complaints and heard from the applicant. A

[14] The Disciplinary Committee found the applicant guilty of dishonest and fraudulent conduct in breach of s. 94(3)(c) of the LPA 1976 and guilty of conduct which is unbefitting of an advocate and solicitor under s. 94(3)(o) of the LPA 1976. The Disciplinary Committee recommended that the applicant be suspended from practice for one month and a fine of RM5,000 be imposed. B

[15] On 13 October 2016, the respondent considered the Disciplinary Committee's report and affirmed the Disciplinary Committee's finding on liability but disagreed with the punishment recommended against the applicant. Consequently, the respondent issued a notice dated 4 November 2016 to the applicant to appear on 9 December 2016 pursuant to s. 103D(2) and (4) of the LPA 1976 with a view to enhance the punishment. C

[16] However, upon the request of the applicant, the hearing on 9 December 2016 before the respondent did not proceed. The hearing before the respondent was instead adjourned to 17 February 2017 and subsequently brought forward to 10 February 2017. D

[17] By a letter dated 8 February 2017, the applicant's solicitor served on the respondent, amongst others, the judicial review application and the draft order dated 8 February 2017 whereby the High Court had granted the applicant leave to file the judicial review application and a stay of the disciplinary proceedings of the complaint. E

The Respondent's Case For Striking Out F

[18] The position of the respondent is that the decision made on 13 October 2016 is not reviewable on the ground alleged by the applicant based on the following reasons:

(i) the purported decision of the respondent dated 13 October 2016 affirming the Disciplinary Committee's finding on liability but disagreeing with the punishment recommended against the applicant is not a "decision"; and G

(ii) pursuant to s. 111 of the LPA 1976, there can be no action against the respondent for any act or thing done under the LPA 1976 as the applicant has not shown that the respondent had done anything in bad faith or with malice. H

[19] In these circumstances, the respondents contended that the application is an abuse of process of the court and that there are no reasonable prospects of the applicant's judicial review application to succeed. I

[20] In his memorandum of appeal, the applicant raised the following points:

1. Hakim bijaksana telah terkhilaf dari segi undang-undang apabila gagal mempertimbangkan bahawa Mahkamah mempunyai bidang kuasa yang luas untuk mendengar permohonan untuk semakan Kehakiman walaupun terdapat peruntukan yang tidak membenarkan semakan kehakiman ('ouster clause').

2. Hakim Bijaksana telah terkhilaf dari segi undang-undang dan/atau fakta apabila mendapati permohonan Perayu untuk semakan Kehakiman adalah salah guna proses undang-undang tanpa mempertimbangkan bahawa pada 8.2.2017, Perayu telah mendapat kebenaran daripada Yang Arif Datuk Mohd Yazid bin Hj Mustafa Hakim Mahkamah Tinggi yang sebelumnya untuk memfailkan permohonan semakan kehakiman maka perintah untuk membatalkan permohonan semakan kehakiman adalah aib dan defektif.

3. Hakim bijaksana telah terkhilaf dari segi undang-undang dan/atau fakta apabila mendapati permohonan Perayu untuk semakan kehakiman adalah satu salah guna proses undang-undang tanpa mempertimbangkan bahawa permohonan semakan kehakiman Perayu mempunyai asas dan isu yang perlu diputuskan oleh Mahkamah.

4. Hakim bijaksana telah terkhilaf dari segi undang-undang dan/atau fakta apabila gagal mempertimbangkan bahawa terdapat isu-isu ketidakadilan dan kesilapan prosedur yang dibuat oleh Responden dan/atau Jawatankuasa Tatatertib (DC) seperti berikut:

   a) DC telah menamatkan pendengaran aduan tersebut tanpa memberi Perayu peluang untuk memanggil saksi utama, Cik Wong iaitu bekas staf dan kerani di firma Perayu untuk memberi keterangan mengenai tarikh-tarikh yang berbeza pada perjanjian jual beli yang merupakan subjek aduan tersebut;

   b) Dalam Laporan DC, DC telah terkhilaf apabila menyatakan bahawa saksi Perayu, En Khor tidak pernah hadir di mana-mana hari pendengaran aduan tersebut sedangkan En Khor telah hadir pada hari pertama pendengaran dan telah menunjukkan Perjanjian Jual Beli beliau yang bertarikh 12.4.2013;

   c) Dalam Laporan DC, DC juga telah gagal mempertimbangkan kandungan surat akuan En Khor yang menyatakan bahawa Cik Wong telah berjanji untuk menolong beliau untuk memastikan bahawa tiada apa-apa faedah lewat akan dikenakan ke atas En Khor;

   d) Dalam Laporan DC, DC juga telah menyalahkan En Khor yang tidak dapat hadir untuk pendengaran manakala DC sendiri yang telah melapangkan tarikh 22.2.2016 yang telah ditetapkan untuk pendengaran aduan tersebut dimana En Khor sedia untuk hadir sebagai saksi untuk disoal balas;

e) DC gagal mempertimbangkan bahawa atas keadaan sedemikian maka Perayu terpaksa memohon surat akuan daripada En Khor untuk memberi keterangan bagi pihak Perayu dan bukan seperti yang dinyatakan oleh DC dalam Laporan DC.

f) DC juga gagal mempertimbangkan bahawa cadangan keterangan En Khor melalui surat akuan adalah dimaklumkan oleh pengerusi DC, En Kem kepada Perayu melalui emelnya bertarikh 30.3.2016 maka tidak terpulang kepada DC untuk menyatakan kandungan surat akuan tersebut tidak boleh diterima oleh kerana En Khor tidak disoal balas;

g) Responden telah belaku tidak adil kerana langsung tidak menjawab atau membalas surat Perayu bertarikh 25.8.2016 bahawa Perayu tiada menerima apa-apa maklum balas dari DC sejak daripada surat Perayu kepada DC bertarikh 26.4.2016;

h) Responden tidak mengambil kira bahawa prosiding pendengaran DC adalah separa jenayah ("quasi criminal") maka penemuan DC tanpa mendengar keterangan saksi utama, Cik Wong adalah satu penemuan fakta yang tidak selamat, sangsi dan langsung tidak menepati tahap pembuktian melampaui keraguan yang munasabah ("beyond reasonable doubt") yang diperlukan untuk kes separa jenayah.

5. Hakim bijaksana telah tekhilaf dari segi undang-undang dan/atau fakta apabila mendapati permohonan Perayu untuk semakan kehakiman adalah pramatang tanpa mempertimbangkan bahawa semakan kehakiman Perayu ini adalah hak Perayu berlandaskan isu-isu ketidakadilan dan kesilapan prosedur dalam proses DC dan Responden membuat keputusan mereka.

Issues

[21] The issues for decision can be summarised as follows:

(i) Whether a judicial review application may be struck out by an application under O. 18 r. 19 of the ROC 2012 after an order for leave has been granted.

(ii) Whether it is an abuse of the process of the court to apply for judicial review proceedings when the Disciplinary Board has not made its decision.

[22] We now turn to the learned High Court Judge's reasons for deciding to allow the respondent's claims to strike out the judicial review. He began by holding that the respondent's decision dated 13 October 2016 is not a final decision and neither has the disciplinary proceedings come to an end.

[23] The learned High Court Judge said:

A

[5] It is common ground that the respondent's decision dated 13.10.2016 is not a final decision in so far as the disciplinary proceedings are concerned. Neither has the disciplinary proceedings come to an end. The respondent had *via* its decision of 13.10.2016 merely concurred with the findings of the Disciplinary Committee as regards the applicant's guilt, ie, in respect of dishonest and

B

fraudulent conduct in breach of section 94(3)(c) of the Legal Profession Act 1976; and conduct unbefitting of an advocate and solicitor under section 94(3)(o) of the Legal Profession Act 1976. The respondent had disagreed with the Disciplinary Committee's recommendations as to the punishment to be imposed, and this, the respondent has every right to do so under its powers in section

C

103D(2), (3) and (4) of the Legal Profession Act 1976 that provides:

(2) The Disciplinary Board may, in appropriate cases impose a greater or lesser penalty or punishment than is recommended by the Disciplinary Committee.

D

(3) Where the Disciplinary Board does not agree with the finding or recommendation of the Disciplinary Committee, the Disciplinary Board shall make such other orders it deems just.

(4) Before the Disciplinary Board makes an order that is likely to be adverse against an advocate and solicitor under subsection (2) or (3), it shall notify the advocate and solicitor of its

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intention to do so and give him a reasonable opportunity to be heard.

[6] The respondent can make an order increasing the punishment recommended by the Disciplinary Committee only after the respondent has been given reasonable opportunity to be heard.

F

Accordingly, the respondent had given the applicant the requisite notice under section 103D(4) of the Legal Profession Act 1976 *via* its letter dated 4.11.2016; and had in fact given the applicant further time to make representation by adjourning, at the applicant's request, the hearing fixed for 9.12.2016 to 17.2.2017, and subsequently brought it forward to 10.2.2017.

G

[7] Now, these acts of the respondent are clearly within its statutory powers found in section 103D of the Legal Profession Act 1976. The applicant had lodged an objection to the respondent in respect of its decision of 13.10.2016. The respondent had fixed a date for hearing the applicant on his objections. However, even before the

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respondent could reasonably hear the matter of the applicant's objection and make any appropriate order on the punishment to be meted out, the applicant has stolen a march and applied for judicial review to thwart the disciplinary proceedings by challenging the respondent's decision made in the course of proceedings.

I

[24] It can be seen that the main reason which persuaded the learned High Court Judge to allow the striking out of the judicial review claim was the fact that the commencement of the judicial review proceeding was premature.

[25] We have considered the parties' submissions very carefully and taking all the circumstances into account, we are not persuaded that the applicant's claim at the material time was justified. Our reasons follows.

The Relevant Statutory Provisions

[26] The starting point for answering a challenge of the type brought by the applicant is a recollection of the key provisions in the LPA 1976 with regards to disciplinary proceedings.

[27] The core primary legislation relating to the disciplinary proceedings is contained in ss. 93 to 103EB of the LPA 1976. For the present purpose, it is sufficient to refer to the following provisions:

(i) **Section 94(1):**

All advocates and solicitors shall be subject for the purposes of all disciplinary actions to the control of the Disciplinary Board;

(ii) **Section 103B:**

Inquiry by the Disciplinary Committee

(iii) **Section 103C:**

Findings and recommendations of Disciplinary Committee

(iv) **Section 103D:**

Consideration by Disciplinary Board of the report of the disciplinary committee

(4) Before the disciplinary board makes an order that is likely to be adverse against an advocate and solicitor …, it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard.

(v) **Section 103E:**

Appeal from the final order or decision of the Disciplinary Board.

(emphasis added)

[28] The disciplinary process under the LPA 1976 should involve two stages: the inquiry stage before the Disciplinary Committee and the formal investigation stage by the Disciplinary Board.

[29] Before we proceed to consider the issues, it is necessary that we set out the relevant provisions in the LPA 1976 relating to the inquiry by the Disciplinary Committee and the Disciplinary Board.

A **The Disciplinary Committee**

[30] Where any complaint on the conduct of an advocate and solicitor is referred to the Chairman of the Disciplinary Board under s. 100(2) of the LPA 1976, he shall constitute the Disciplinary Committee to inquire into the complaint or information.

B

[31] It is important to note that the power of the inquiry committee is merely to investigate the complaint. It does not have to make any conclusion on misconduct or whether an offence was committed but simply to consider whether or not there is a *prima facie* case for formal investigation.

C **[32]** The Disciplinary Committee in cases such as the present case, do not make "decision". They merely report to the Disciplinary Board in regards to a complaint.

The Disciplinary Board

D **[33]** Pursuant to s. 103D of the LPA 1976, the Disciplinary Board shall consider the report of the Disciplinary Committee and may make an order affirming or rejecting the finding or recommendation of the Disciplinary Committee.

[34] Before the Disciplinary Council makes an order, it shall notify the E advocate and solicitor concern of its intention to do any so and give him a reasonable opportunity to be heard by the Disciplinary Council.

[35] The applicant submitted that as a person aggrieved by the respondent's decision dated 13 October 2016, he can avail himself of his statutory rights enshrined in s. 103EA of the LPA 1976 to file for judicial review. The F applicant maintains that the judicial review application is proper before this court and that it is not an abuse of the court's process.

[36] Section 103E(1) of the LPA 1976 provides:

> (1) Any party aggrieved by any final order or decision made by the G Disciplinary Board:
>
> (a) pursuant to subsection 94(4);
>
> (b) under paragraph 100(1)(a), (3)(a) or subsection 100(7), (8) or (15); or
>
> (c) under section 103D, shall have the right to appeal to the High H Court within one month of the receipt of the notification of that order or decision.

I

Whether A Judicial Review Application May Be Struck Out By An Application Under Order 18 rule 19 ROC 2012 After An Order For Leave Has Been Granted

[37] Learned counsel for the applicant submitted that the respondent's application to strike out the applicant's judicial review pursuant to O. 18 r. 19(b) or (d) of the ROC 2012 after the applicant had obtained leave to proceed with the substantive hearing is erroneous, defective and abuse of court proceeding.

[38] In support of his submissions, the applicant relied on the following grounds:

(i) If the respondent is aggrieved with the court's order granting leave to file for judicial review, the proper recourse for respondent is to appeal against the said order as provided in O. 53 r. 9 of the ROC 2012 which provides:

> An application to set aside any order made by the Judge shall not be entertained, but the aggrieved party may appeal to the Court of Appeal.

(ii) The respondent's application to strike out the appellant's judicial review is a collateral attack to set aside the leave order granted by the court which resonates against O. 53 r. 9 if the ROC 2012.

(iii) The wordings of O. 53 r. 9 of the ROC 2012 is clear that any application to set aside any order of the judge shall not be entertained but the aggrieved party can appeal to the Court of Appeal.

[39] The issue of whether a judicial review application may be struck out under O. 18 r. 19 of the ROC 2012 after leave has been granted was raised for the first time in the applicant's written submission in this appeal. This issue was not raised before the learned High Court Judge neither was it included by the applicant in his memorandum of appeal.

[40] An appeal court will not allow an appellant to argue a ground that has not been pleaded in its memorandum as a matter of essential justice to the court below and to the respondent who would have defended a judgment of the High Court on an unpleaded grounds of appeal (see *Malaysia Land Properties Sdn Bhd v. Waldorf & Windsor Joint Management Body* [2014] 6 CLJ 821; [2014] 3 MLJ 467; *Luggage Distributors (M) Sdn Bhd v. Tan Hor Teng @ Tan Tien Chi & Anor* [1995] 2 CLJ 713; [1995] 1 MLJ 719; *Joo Seng Trading Co v. Commercial Importers And Distributors Sdn Bhd* [2007] 2 CLJ 25; [2007] 4 MLJ 128; *Century Land Resources Sdn Bhd v. Alliance Bank Malaysia Bhd* [2004] 4 CLJ 793; and *Menteri Tenaga, Air Dan Komunikasi & Anor v. Malaysian Trade Union Congress & Ors* [2012] 9 CLJ 858; [2013] 1 MLJ 61).

[41] Therefore, we are of the view that the applicant is precluded from raising this point for the first time in this appeal.

[42] Be that as it may, we will consider the applicant's submission on this issue. It is clear from the wordings of O. 53 r. 3(1) and (2) of the ROC 2012 that the application for leave is only *ex parte* which means that the respondent does not have a right of appearance. The proper procedure for the respondent to file the application would be only when the court has granted *ex parte* leave to the applicant and that order is extracted and served on them. It is the service of the *ex parte* order together with the cause papers on the respondent that makes the respondent parties to the proceedings. It follows that the respondent can only file the application after leave to commence judicial review proceeding was granted by the court. Therefore, the learned High Court Judge has not erred in law when he allowed the respondent's application to strike out the applicant's judiciary review application after leave has been granted.

Premature Decision

[43] The applicant further submitted that the learned High Court Judge had fallen into error by striking out the judicial review application and holding that the application is premature, and abuse of the court process and that there is another appropriate remedy for the applicant.

[44] In support of his submission, the applicant relied on the following authorities: *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532; [2006] 3 MLJ 164 and *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7; [1993] 1 MLRA 611.

[45] The respondent submitted to the contrary. The respondent's submissions included the following points:

(i) the purported decision of the respondent dated 13 October 2016 is not a decision, order, ruling or direction (not being a final order or decision) made by the Disciplinary Committee or the Disciplinary Board in respect of an objection raised by the appellant;

(ii) the appellant has a right of appeal to the High Court pursuant to s. 103E of LPA 1976 in respect of any decision made by the respondent in affecting the appellant. Thus, the appellant's remedy, if he is dissatisfied with the decision of the respondent dated 13 October 2016, is to wait for the respondent to make an order under s. 103D of the LPA 1976 after hearing the appellant on the issue of enhancement of punishment and then to file an appeal to the High Court pursuant to s. 103E of the LPA 1976; and

(iii) In any event, there can be no action against the respondent for any act or thing done under the LPA 1976 as the appellant has not shown that the respondent had done anything in bad faith or with malice (see s. 111 of the LPA 1976).

[46] The applicant's claim in this judicial review proceedings is concerned with the alleged infringement of his right under the LPA 1976. Order 53 r. 2(4) of the ROC 2012 provides that any person who is adversely affected by the decision in relation to the exercise of the public authority or someone shall be entitled to make the application for *certiorari*.

[47] It is a principle which remains a good and trite law that *certiorari* will lie to quash a decision which has already been made by a public authority in excess or abuse of jurisdiction or contrary to the rules of natural justice or where there is an error of law on the face of the decision of the public authority (see *Malaysian Court Practice* (2007 Desk edn) at p. 670). For a decision to be quashed on judicial review or susceptible to the court's reviewing powers, there must first be a decision by a decision maker, and that decision must affect the aggrieved party by either altering the rights or obligations or depriving him of the benefits which he has been permitted to enjoy (see *Ahli-ahli Suruhanjaya Yang Membentuk Suruhanjaya Siasatan Mengenai Rakaman Klip Video Yang Mengandungi Imej Seorang Yang Dikatakan Peguambela Dan Peguamcara Berbual Melalui Telefon Mengenai Urusan Pelantikan Hakim-hakim v. Tun Dato' Seri Ahmad Fairuz Dato' Sheikh Abdul Halim & Other Appeals* [2012] 1 CLJ 805; [2011] 6 MLJ 490; and *Council of Civil Service Unions and Others v. Minister for the Civil Service* [1984] 3 All ER 935).

[48] Clearly, the law we apprehend, is that, apart from requiring the applicant to make the application for judicial review with sufficient promptitude and to show that they were adversely affected by the decision of the public authority communicated to them, there must first be shown that a requisite decision by the appellant as a public authority had been made before the application could come within the bounds of O. 53 of the ROC 2012. It is therefore not open for the appellant to argue and for this court to hold, based on this principle, that *certiorari* will not lie to quash a decision if no such decision has been made by a public authority. This was the decisive or important point at issue that was canvassed before this court (see *Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd* [2017] 5 CLJ 283; [2017] 2 MLJ 197).

[49] In this present case, the argument turns upon whether the "decision" of the respondent wherein it had in its meeting held on 13 October 2016, agreed with the findings and decision of the Disciplinary Committee as regards the appellant's conduct was a "decision".

[50] The application characterised the Disciplinary Board's decision as being "a decision" under s. 103D of the LPA 1976.

[51] We have considered the parties submissions very carefully and taking all circumstances into account, we are not persuaded that the applicant's application for judicial review at the material time was justified.

[52] Pursuant to s. 103D(4) of the LPA 1976, it was Parliament's intention that an advocate and solicitor be given the right to make a representation before the Disciplinary Board. Such representation should have been taken into account before the procedure for punishment is finalised, and it is only at the end of this process that the Disciplinary Board must make a decision with respect to the nature of the punishment to be imposed.

[53] It is our considered opinion that an advocate and solicitor, who is dissatisfied with any decision of the Disciplinary Board should in the first instance make representation after receiving notice under s. 103D(4) from the Disciplinary Board. Therefore, the applicant should avail himself of the right to make representations under s. 103D(4) before commencing judicial review proceeding against the respondent.

[54] Protections for the applicant are provided under s. 103D(4) of the LPA 1976. It must be emphasised that at that stage, the applicant was not in a position to allege that his right has been infringed until the Disciplinary Board make a decision under s. 94 of the LPA 1976.

[55] Pursuant to s. 103D(4) where a notice is issued to an advocate and solicitor, the Disciplinary Board must carry out a review of the nature of the punishment to be imposed on the advocate and solicitor. If the punishment imposed does not lead to an outcome satisfactory to an advocate and solicitor, then he may appeal to the High Court against the said finding of liability and the punishment.

[56] In our opinion, the applicant had a right, which it has not yet been exercised. The applicant should avail himself of the representation before the Disciplinary Board and then await the outcome of his representation to decide whether there are at that stage ground for judicial review. It is an abuse of the proceeding of the court to avoid the safeguard provided by s. 103(D) of the LPA 1976.

[57] In *Chin Mee Keong & Ors v. Pesuruhjaya Sukan* [2007] 5 CLJ 363; [2007] 6 MLJ 193 the facts are as follows, the appellants on their own, and on behalf of the Malaysia Taekwando Association ("MTA") had applied under O. 53 r. 3(2) of the Rules of the High Court 1980 ("the RHC") a judicial review application, for an order that they be granted leave to apply for an order of *certiorari*, to remove a show cause letter dated 15 April 2005 and to quash the order of revocation of registration of the appellants' Association. The Association was until 6 May 2005 a registered sports body pursuant to s. 18 of the Sports Development Act 1997 ("the Act") but, on 6 May 2005, it became an unregistered and unincorporated sports body with no legal personality. This order of revocation of registration, dated 6 May 2005 was issued by the respondent under s. 20 of the Act. The order of revocation of registration came about as the Sports Commissioner had directed the MTA to amend its three constitutions, to allow voting rights to

clubs, a power of direction which was disputed by the appellants. MTA did not give in, resulting in the respondent deregistering the MTA. MTA could have appealed to the Minister of Sports against the decision of the respondent under s. 21(1)(a) of the Act. However, MTA alleged that the Minister had made various "uncontradicted, unretracted and unchallenged press statements" showing the Minister's prejudice and prejudgment. A preliminary objection was also raised in the High Court that the appellants had no *locus standi* to make this application as the applicants were not authorised persons to sue for and on behalf of MTA. The High Court dismissed the application principally on the ground that the judicial review application was premature as the appellants had an alternative remedy under s. 21(1)(c) of the Act to appeal to the Minister. The High Court stressed that it was premature to judge the Minister for being bias, prejudiced and had prejudged the issue when she had not even heard the appeal.

[58] The authorities reveal that the element of conclusiveness must be present before a "decision" can be found to occur (see *M & W Zander (M) Sdn Bhd v. Director General Of Inland Revenue* [2005] 6 CLJ 336; *R v. St Lawrence's Hospital, Caterham Statutory Visitors, ex p Pritchard* [1953] 1 WLR 1158; and *Ketua Pengarah Hasil Dalam Negeri v. Mudah.my Sdn Bhd (supra)*)

[59] We do not think that the Disciplinary Board's action on 14 November 2010, informing the applicant, can be properly characterised as a "decision" within the meaning of s. 103D of the LPA 1976. What was involved was not a decision which was final. A decision to affirm the finding on liability but disagreeing with the punishment recommended by the Disciplinary Committee to be imposed on the application in our view is not a "decision". Furthermore, it must be emphasised that the Disciplinary Committee's decision is not binding on the Disciplinary Board.

[60] Therefore, we are of the view that the commencement of the judicial review proceedings was premature given the applicant's failure to take the clear alternative step of making representations to the Disciplinary Board under s. 103D(4) of the LPA 1976 which provides that before the Disciplinary Board makes an order that is likely to be adverse against an advocate and solicitor under sub-ss. (2) or (3), it shall notify the advocate and solicitor of its intention to do so and give him a reasonable opportunity to be heard. In our view, s. 103D(4) of the LPA 1976 provides an appropriate remedy which the applicant should exhaust before commencing the judicial review proceedings.

[61] Thus, the learned High Court Judge was correct in his finding that the act of the respondent was clearly within its statutory powers found in s. 103D of the LPA 1976. The applicant had lodged an objection to the respondent in respect of its decision of 13 October 2016. The respondent had fixed a date for hearing the appellant on his objections. However, even before the

respondent could reasonably hear the matter of the appellant's objection and make any appropriate order on the punishment to be meted out, to borrow the words of the learned High Court Judge, the applicant has stolen a march and applied for judicial review to thwart the disciplinary proceedings by challenging the respondent's decision made in the course of the proceedings.

[62] Based on the above reasons, we are in agreement with the learned High Court Judge, in holding that, to allow the actions to proceed would be an abuse of the process of the court.

Alternative Remedy

[63] It is a well established principle that judicial review is a remedy of last resort, to which recourse should normally be held only where there is no available alternative remedy (see *Lai Cheng Cheong v. Sowaratnam Arumugan* [1983] 1 CLJ 282; [1983] CLJ (Rep) 216; [1983] 2 MLJ 113; *Iskandar Coast Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2019] 7 CLJ 143; [2019] 5 MLJ 236; *Ketua Pengarah Kastam Dan Eksais v. Coach Malaysia Sdn Bhd* [2019] 4 CLJ 454; [2019] 2 MLJ 716; and *Bintulu Lumber Development Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2020] 1 LNS 65; [2020] MLJU 59). Parliament is likely to have intended that an aggrieved person who wished to challenge the decision of the Disciplinary Board should first exercise his right to make representations under s. 103D(4) of the LPA 1976 (see *R (on the application of Archer) v. Revenue and Customs Commissioners* [2020] All ER 7116 (followed).

[64] We will refer to Fales LJ's discussion in the case of *R (On the application of Glencore Energy UK Ltd) v. Revenue and Customs Comrs* [2017] EWCA Civ 1716 of the "suitable alternative remedy principle" which is relevant to the present case:

> [55] In my view, the principle is based on the fact that judicial review in the High Court is ordinarily a remedy of last resort, to ensure that the rule of law is respected where no other procedure is suitable to achieve that objective. However, since it is a matter of discretion for the court, where it is clear that a public authority is acting in defiance of the rule of law, the High Court will be prepared to exercise its jurisdiction then and there without waiting for some other remedial process to take its course. Also, in considering what should be taken to qualify as a suitable alternative remedy, the court should have regard to the provision which Parliament has made to cater for the usual sort of case in terms of the procedures and remedies which have been established to deal with it. If Parliament has made it clear by its legislation that a particular sort of procedure or remedy is in its view appropriate to deal with a standard case, the court should be slow to conclude in its discretion that the public interest is so pressing that it ought to intervene to exercise its judicial review

function along with or instead of that statutory procedure. But of course it is possible that instances of unlawfulness will arise which are not of that standard description, in which case the availability of such a statutory procedure will be less significant as a factor.

[56] Treating judicial review in ordinary circumstances as a remedy of last resort fulfils a number of objectives. It ensures the courts give priority to statutory procedures as laid down by Parliament, respecting Parliament's judgment about what procedures are appropriate for particular contexts. It avoids expensive duplication of the effort which may be required if two sets of procedures are followed in relation to the same underlying subject matter. It minimises the potential for judicial review to be used to disrupt the smooth operation of statutory procedures which may be adequate to meet the justice of the case. It promotes proportionate allocation of judicial resources for dispute resolution and saves the High Court from undue pressure of work so that it remains available to provide speedy relief in other judicial review cases in fulfilment of its role as protector of the rule of law, where its intervention really is required.

[65] In *Mohd Karim Abas & Ors v. Ketua Pengarah Jabatan Hal Ehwal Kesatuan Sekerja* [2013] 1 LNS 280; [2013] 4 MLJ 420 this court held that:

...

(a) it is trite that judicial review is nothing but a potent and effective procedural device within the armoury of the High Court to supervise and control the decision making process of public bodies or like to ensure that they act within the spirit and powers of the Federal Constitution and/of statutes and if necessary to restrain the decision maker from acting in excess and/or abuse of power. This process is also used to check and arrest executive excesses and encroachment (see *Chong Chung Moi @ Christine Chong v. The Government of the State of Sabah & Ors* [2007] 5 MLJ 441).

The court themselves have placed various restrictions to control exodus of complaints against public bodies by busy bodies and alike, or where the complaint is premature or trivial or misconceived as in the instant case. The development of the law in this area of jurisprudence will clearly show that the goal post for obtaining the relief has often been molded from time to time and is not seen as a static concept. If judicial fetters are employed, it is only for the purpose of stopping busy bodies or premature claims, who ultimately cannot be given any form of relief and from disturbing the courts and the workings of the government and public bodies. And no one case is binding on another for court's intervention when the issue relates to fundamental guarantees and/or public interest as a whole. It all depends on the factual matrix of the case, public interest and urgency for the court's intervention even though there may be room to argue that intervention may be premature.

...

[66] This court in *Mohd Karim* (*supra*) dismissed the appellant's appeal *in limine* on the ground that it was frivolous, vexatious and abuse of the court process, *inter alia*, on the ground that no reason was given why appeal mechanism provided under the Act has not been complied with.

[67] In our view, the act of the Disciplinary Board *vide* notice dated 4 November 2016 is itself not a reviewable decision but a step in the process which will ultimately lead to a decision which is reviewable after the Disciplinary Board imposed the punishment under s. 94 of the LPA 1976.

[68] In this present case, the applicant has a right of appeal to the High Court pursuant to s. 103E of the LPA 1976 in respect of any decision made by the respondent in affecting the applicant. Thus, the applicant's remedy, if he is dissatisfied with the decision of the respondent dated 13 October 2016, is to wait for the respondent to make an order under s. 103D of the LPA 1976 after hearing the applicant on the issue of enhancement of punishment and then to file an appeal to the High Court pursuant to s. 103E of the LPA 1976. In this circumstance, the applicant's application for judicial review is premature and amounts to an attempt to short-circuit the statutory disciplinary and appellate process provided in the LPA 1976.

[69] It is relevant to note that on 3 June 2014, s. 103EA of the LPA 1976 was amended as follows:

> (1) Where a party is aggrieved by any decision, order, ruling or direction of the Disciplinary Committee or the Disciplinary Board, other than a final order or decision made by the Disciplinary Board referred to in s. 103e, the aggrieved party may file an objection in writing in respect of any such decision, order, ruling or direction with the Disciplinary Committee or Disciplinary Board, as the case may be, within fourteen days of being duly notified of the decision, order, ruling or direction.
>
> (2) Where the objection raised is in respect of the composition or participation of any member of the Disciplinary Committee or the Disciplinary Board, as the case may be, in meetings, proceedings or inquiries before the Disciplinary Committee or Disciplinary Board, the procedures to deal with the objection shall be as set out in the rules made under this Part.
>
> (3) After the objection referred to in sub-section (2) has been dealt with, the Disciplinary Committee or the Disciplinary Board, as the case may be, shall proceed with the inquiry or proceeding until its completion.
>
> (4) Where the objection raised is not related to matters referred to in subsection (2), the disciplinary committee or Disciplinary Board, as the case may be:

(a) shall make such decision, order, ruling or direction on the objection as it deems just; and

(b) shall proceed with the inquiry or proceeding until its completion.

(5) Where the inquiry or proceeding referred to in sub-section (3) and paragraph (4)(b):

(a) is before the Disciplinary Committee, after the completion of the inquiry or proceeding, the Disciplinary Committee shall make its recommendation to the Disciplinary Board pursuant to section 103C; or

(b) before the Disciplinary Board, after the completion of the inquiry or proceeding, the Disciplinary Board shall make its order or decision pursuant to section 103D.

(6) The order or decision of the Disciplinary Board under paragraph (5)(b) shall be suspended from coming into effect for thirty days from the date of the order or decision or to such further time as the court may allow to enable an aggrieved party to apply to the court for a review.

(7) If an aggrieved party does not apply for review, the order or decision of the Disciplinary Board shall take effect immediately upon the expiration of the period of thirty days.

(8) Nothing in this section shall preclude an aggrieved party from raising any objections under this section as grounds of appeal in any appeal he may file under section 103E.

[70] It is important to note that the saving provisions in s. 21(4) and (5) of the Legal Profession (Amendment) Act 2012 (LPA 2012), which amended the LPA 1976 and introduced s. 103EA provides that the principal Act then prevailing shall continue to apply. The saving provisions state as follows:

...

(4) Where on the date of coming into operation of this Act, disciplinary proceedings that were pending before the Disciplinary Board, the proceedings shall continue under the provisions of the principal Act to those proceedings immediately before the date of coming into operation of this Act and the Disciplinary Board may make such order or decision as it could have made under the authority vested in it under the principal Act immediately before the date of coming into operation of this Act.

(5) Any written application or complaint concerning the conduct of any advocate and solicitor or any pupil referred to the Disciplinary Board before the date of coming into operation of this Act shall be dealt with under the provisions of the principal Act applicable to the disciplinary proceedings immediately before the date of coming into operation of this Act.

[71] The principal Act as it stood before the coming into force of s. 103EA is provided in s. 103E(2) of LPA 1976 as follows:

> (2) There shall be no judicial review against any decision or order made by the Disciplinary Board.

[72] Hence, from the reading of the then s. 103E(2) of the LPA 1976, it seems clear that the law as it then stood precluded the applicant from moving the respondent's decision of 13 October 2016 into this court for judicial review.

[73] Therefore, we should not intervene at this stage until the Disciplinary Board has considered the form of punishment to be imposed on the applicant under s. 94 of the LPA 1976. Accordingly, this appeal should be dismissed, but without prejudice to such further application as the applicant may desire to make in the light of the proceedings taken and the orders to be made by the Disciplinary Board.

Conclusion

[74] Given the applicant's failure to take the clear step of making representations under s. 103D(4) of the LPA 1976, we are of the view that the application for judicial review is premature. Therefore it would be an abuse of the court process for the court to hear the judicial review application when the Disciplinary Board has not concluded its decision. We, therefore, dismissed the appeal with no order as to costs and affirmed the High Court order.